

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 STATE OF OREGON by and through)  
4 Ellen F. Rosenblum, Attorney )  
General for the State of )  
Oregon, )

5 Plaintiff, )

Case No. 3:18-cv-00238-MO

6 v. )

7 July 19, 2018

8 MONSANTO COMPANY, SOLUTIA )  
INC., and PHARMACIA LLC; and )  
9 DOES 1-10, )

Portland, Oregon

10 Defendants. )  
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16 **Oral Argument**

17 TRANSCRIPT OF PROCEEDINGS

18 BEFORE THE HONORABLE MICHAEL W. MOSMAN

19 UNITED STATES DISTRICT COURT CHIEF JUDGE  
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1 (P R O C E E D I N G S)

2 (July 19, 2018; 3:11 p.m.)

3 THE CLERK: We are here for oral argument in Case No.  
4 3:18-cv-238-MO, State of Oregon v. Monsanto Company, et al.

5 Counsel, please state your name for the record,  
6 starting with plaintiff.

7 MR. KETTERLING: Your Honor, Keith Ketterling for the  
8 plaintiff State of Oregon, along with Nadia Dahab and Yoona  
9 Park. And also with us are Dan Mensher of the Keller Rohrbach  
10 firm and Henry Kantor from Oregon DOJ.

11 MR. HANSEN: Richard Hansen, Monsanto, along with  
12 Donald Fritz Zimmer, Katie Kelly, and Adam Miller.

13 MR. ZIMMER: Fritz Zimmer, Your Honor, of King &  
14 Spalding for Monsanto.

15 THE COURT: Thank you all. Go ahead and be seated.

16 Thank you all for your helpful briefing in this  
17 matter. Quite frankly, the briefing in this case has been a  
18 cut above whatever the average is, and I appreciate the effort  
19 that went into that.

20 Let me lay out what I'd like to discuss at oral  
21 argument, and I'm going to reach a point where the main thing  
22 we discuss will be on that sheet of paper that you just  
23 received from me.

24 So, of course, plaintiff brought this lawsuit in  
25 state court, and Monsanto removed under 28 U.S.C. 1442(a)(1).

1 And that is a provision of federal law that allows a federal  
2 officer to remove the case brought under certain circumstances  
3 in state court to federal court. What's relevant for our  
4 purposes is the parenthetical that says, "a federal officer (or  
5 any person acting under that officer)." And what's been  
6 attempted to be defined since is what that parenthetical means.

7           The core of the statute, of course, gets at an actual  
8 federal officer sued initially in state court, and in my  
9 experience, its most common application in cases not directly  
10 involving federal officers is state and local law enforcement  
11 officers acting on task forces. So that gives you some idea of  
12 what the core of the statute gets at.

13           What is clear in cases where someone is relying on  
14 this parenthetical, (a)(1)'s parenthetical, is that the person  
15 must be acting under the federal officer's subjection, guidance  
16 or control. And that's right out of *Watson*. Or to put it  
17 another way, "acting under" must involve an effort to assist or  
18 help carry out the federal superior's duties or tasks.

19           There may be more to discuss about that standard, but  
20 I think that's the core of the standard, and I think the  
21 parties generally agree, although there's some discussion of  
22 what other cases might do at the perimeter of that standard,  
23 but none of that really alters that core standard in any  
24 meaningful way.

25           And so someone asserting -- a person who is relying

1 on this for proper removal under Section 1442(a)(1) has to show  
2 three things: the one I just mentioned, that it took action  
3 under a federal officer's subjection, guidance or control; two,  
4 that there's a causal connection between the claimed harm or  
5 conduct and the federal control -- that is, that the complaint  
6 arises out of the acts done by it under federal control; and  
7 three, that it can assert a colorable federal defense.

8           So if I have this right, Monsanto asserts three  
9 possibilities here for colorable federal defense: one is the  
10 government contractor defense, which I'll discuss more fully  
11 later; and the other is the Defense Production Act defense; and  
12 the third is a sort of a defense of preemption.

13           So for oral argument purposes, I'm going to have you  
14 rest on the briefing on preemption. We won't need to discuss  
15 that any further under CERCLA, and we'll discuss the other two  
16 as it goes along.

17           So the test to apply here is whether, one, this case  
18 at this stage involves action taken by Monsanto under a federal  
19 officer's subjection, guidance or control; two, is there a  
20 causal connection between those controlled actions and the  
21 claims; and three, whether Monsanto has a colorable government  
22 contractor or DPA defense.

23           I want to get -- I want to talk about and in some  
24 cases get rid of some preliminary or predicate matters. So  
25 first is this question of facial versus factual challenge,

1 because it does impact the burden of proof possibly on  
2 Monsanto, and in my view, it's a factual challenge that  
3 plaintiff raises here.

4 In a factual challenge, plaintiff contests the  
5 removing party's factual assertions, and it's true for what  
6 it's worth that many of the factual assertions Monsanto makes  
7 here are not contested. Perhaps numerically most of them are  
8 not contested for today's purposes. But when Monsanto asserts,  
9 and the State disagrees with the assertion that, quote, the  
10 federal government -- just as an example, that the federal  
11 government financed the expansion of Old Monsanto's facilities,  
12 when Monsanto asserts that and the State disagrees with that,  
13 what you have is a factual disagreement, a fact dispute. And  
14 that triggers the burden to produce competent proof of the  
15 asserted fact, the burden on Monsanto.

16 Facial, in my view, would be something more abstract.  
17 Facial would be somebody arguing -- just to attempt a facial  
18 argument here -- that no private party can rely on 1442(a)(1),  
19 for example, and the facts don't matter, it's just the statute  
20 itself.

21 There's been some discussion about whether *Watson*  
22 states the controlling standard in light of subsequent cases --  
23 *Leite*, *Cabalce*, even *Goncalves* -- and the answer is yes, it's  
24 still the controlling standard, and what I've stated I think is  
25 a fair statement of what *Watson* sets out as the controlling

1 standard.

2           There's a discussion of -- so eventually -- again,  
3 these housekeeping predicates are not all analytically in  
4 order, but eventually we get to a discussion if I thought it  
5 was important on whether you get federal question jurisdiction  
6 in this case by virtue of the impact on federal enclaves. And  
7 I don't need to hear any oral argument about federal enclaves.

8           There's also some discussion about whether  
9 consolidation is a factor that might tilt my thinking towards  
10 finding jurisdiction here, and I don't want to hear any further  
11 about that.

12           There's been a request that I take judicial notice of  
13 a number of facts. Some are unobjected to, and I also find  
14 them, the ones that are unobjected to, at least potentially  
15 useful for the analysis, and so I'll take judicial notice of  
16 them.

17           I deny the request to the degree that the State  
18 objects, because I find the State's objections are those things  
19 I don't believe are relevant to my analysis.

20           So what we are left with is taking the asserted basis  
21 for federal officer jurisdiction and running them through a  
22 sort of three-part matrix: is there a showing of the necessary  
23 degree of control; is there a showing of the necessary nexus;  
24 and is there a viable either government contract or a DPA  
25 defense available.

1           And so I don't want to do violence to the entire  
2 structure of the argument you've presented. I'm willing to  
3 hear it in a way that you think will best allow you to present  
4 what you wanted to say, but those are the issues that --  
5 grounded in the asserted bases for jurisdiction I think will  
6 help me the most.

7           Before I close my little opening soliloquy here, I do  
8 want to make sure that the six asserted bases that we've culled  
9 from the briefing covers the ground for the asserted bases that  
10 Monsanto has before me today. Does it?

11           MR. ZIMMER: Your Honor, I've been reviewing that as  
12 you've been speaking. I do see a couple of other things that I  
13 don't see registered in the Court's list, if you don't mind my  
14 offering that.

15           I think there are some exhibits that refer to  
16 unwilling sales that Monsanto made to the government that I'd  
17 certainly like to call the Court's attention to, in particular,  
18 at Exhibit 6, 21, and 23.

19           And I have to admit I was trying to concentrate on  
20 what Your Honor was saying, so I'm not sure that I might not  
21 find others, but that's the one --

22           THE COURT: You'll let me know as you have a chance  
23 to consider them further.

24           MR. ZIMMER: Thank you, Your Honor.

25           THE COURT: Obviously this isn't anything other than



1 a guide to oral argument, so you're not bound by it.

2 MR. ZIMMER: Understood.

3 THE COURT: So it's the State's motion to remand.

4 I'll turn to the State first.

5 MR. KETTERLING: Thank you, Your Honor, and thank you  
6 for the guidance. I think I'm pretty much done with my  
7 argument at this point.

8 What I want to address, given the Court's guidance,  
9 is first I want to talk briefly about *Watson* and about *Leite*  
10 and *Cabalce*. And I think what's important is the Court has the  
11 right standard from *Watson*, but *Watson* is very specific and  
12 says the removal limits are not limitless, that even though  
13 there are grounds for removal, they're not limitless. They  
14 have to be applied with some guidance.

15 And *Leite* --

16 THE COURT: I'm not sure how that advances the ball  
17 much.

18 MR. KETTERLING: Well, I think it says --

19 THE COURT: I agree. I agree that the removal  
20 standards don't allow for limitless removal.

21 MR. KETTERLING: And so then you look at *Leite* and  
22 *Cabalce*, and one shows, you know, a clear example of what is  
23 satisfactory to allow for removal -- that's *Leite* -- and then  
24 *Cabalce* shows exactly what's not enough.

25 And if you look at those two cases, I think it's --

1 in our position, it's very difficult to see how Monsanto falls  
2 anywhere near the *Leite* standard at all. And if you look at  
3 *Watson* and the history that *Watson* provides us with why this  
4 statute came about, again none of that is implicated in this  
5 case. And when we're talking about federal officer control,  
6 direction, in one sense it's really a matter of is this  
7 essentially an employee acting in the course and scope of their  
8 employment or is it an independent contractor. Does the  
9 employer, does the government, the federal officer have such a  
10 level of control and direction, much as you look at in the  
11 employment independent contractor analysis as well. Does the  
12 government have that much control that it is literally telling  
13 the defendant in this case, Monsanto, what we want in this  
14 product, not that we want your product to go into this other  
15 product.

16 And the evidence that we've seen, nowhere does it  
17 provide any specifications of what Monsanto needs to put into  
18 its PCBs. It calls out --

19 THE COURT: That's a little difficult, right, in a  
20 PCB case, because if the federal government orders up a  
21 helicopter and then provides detailed specifications for what  
22 it wants in the helicopter, then that's understandable.  
23 There's a million ways to make a helicopter, and you'd have to  
24 say this is what we want: We want six seats not five, we want  
25 four windows not eight, et cetera. On you go until you've got

1 500 pages of specifications on your helicopter.

2 If the federal government says, well, we want to buy  
3 helium from you, well, then they don't need any specifications,  
4 right? We want you to sell us something and it has to have  
5 helium in it. I mean, that's the end of the specifications,  
6 right? You can't further specify helium.

7 MR. KETTERLING: If you are simply buying a product  
8 off the shelf that that company manufactures --

9 THE COURT: I don't care about off the shelf or not.  
10 I'm just talking about specifications.

11 MR. KETTERLING: But that's not controlling or  
12 directing the company in any sense.

13 THE COURT: What you're saying is that you think it's  
14 insufficient if the federal government says, "If you're going  
15 to sell us this product, it must have PCBs in it," right?  
16 You're saying that's insufficient because that's just one  
17 sentence; it's not very specific.

18 Do I have your argument right?

19 MR. KETTERLING: Except that even in the evidence  
20 that's been put forth, the government doesn't just say, "We  
21 want your PCBs." Back in Exhibit 4, I believe it is, it says,  
22 "This is simply a suggestion that the supplier can use anything  
23 that is equated to this."

24 THE COURT: Sure, we'll get to that. That's a  
25 factual exception. But I want to make sure I understand your

1 broader argument, which I thought was that if the government  
2 says it wants PCBs in the product and doesn't say anything more  
3 about the PCBs, like how they must be made or what they must be  
4 composed of or something like that, that that's insufficiently  
5 demanding to meet the control standard of *Watson*. Is that your  
6 argument?

7 MR. KETTERLING: I think it is.

8 THE COURT: All right. And so my point was I  
9 understand that argument with helicopters and I think it fails  
10 with helium. Right? Would you agree with that? If you say,  
11 "I want you to put helium in it," there's nothing more you can  
12 say, it's either helium or not helium.

13 MR. KETTERLING: But that doesn't provide federal  
14 officer direction. That's the federal government purchasing a  
15 product. That's not the federal government directing you how  
16 to make that product. If anything the federal government  
17 purchased would implicate the federal officer removal statute,  
18 then there would be no state court cases. Every case involving  
19 anyone who provided any product to the federal government would  
20 implicate 1442(1).

21 THE COURT: What I'm trying to figure out is the  
22 level of control involved here, and I want to understand your  
23 argument that it's not there when the government simply says,  
24 "We request that PCBs be in the product" or that we request  
25 that anything be in what we purchase. The federal government

1 can buy something and it can say, "When we buy this thing, it  
2 has to have the following elements." And you're saying that if  
3 that's all the government does, just says this product that we  
4 want to buy must contain the following elements, that's  
5 insufficient control?

6 MR. KETTERLING: Yes, it is.

7 THE COURT: And if the specification list isn't long  
8 and demanding, you know, we want to buy a toilet for our jets,  
9 and it's got to be exactly like this, and the specifications go  
10 on for 25 pages, is that demanding enough? I mean, is there a  
11 point where it can be so specific about what it wants to buy  
12 that it meets the *Watson* standard? Is there any point where it  
13 can meet the *Watson* standard by being so specific about what it  
14 wants to buy?

15 MR. KETTERLING: Depends, I think, on whether you're  
16 talking about the actual manufacture of the entire product or  
17 if you're talking about just one component of that product.  
18 And if you -- if the federal government goes and says, this is  
19 how we want our toilets built, and it gets into every detail,  
20 every little detail may not -- every supplier, every  
21 subcontractor is not necessarily a federal officer directorate,  
22 but that overall manufacturer, if it's doing it exactly the way  
23 the government says, that could implicate federal officer  
24 removal. We're not at that point here. We're at a point --

25 THE COURT: That's a different argument. That's

1 saying that you're just a supplier to someone who is in a  
2 contractual relationship with the government. That won't  
3 work -- or rather that Monsanto is, that that won't work,  
4 right?

5 MR. KETTERLING: Right.

6 THE COURT: I'm trying to make a more elemental point  
7 and make sure I understand your position, and that is you do  
8 agree that the federal government in buying something can be so  
9 specific that at least as to the person providing the product  
10 in the direct selling relationship to the government, it would  
11 meet *Watson's* control standard. That's possible, do you agree?

12 MR. KETTERLING: It's possible. I'd have to see a  
13 specific situation, but yes, I would agree that it's possible.

14 THE COURT: And so what we have to ask is not whether  
15 it's merely a purchase by the government but whether it's a  
16 purchase by the government that has a lot of specificity and  
17 demand to it made not to somebody else but to Monsanto. And if  
18 it has a lot of it, then maybe we're getting there, and if  
19 there's not much, we're not getting there, right?

20 MR. KETTERLING: Right. If there's specificity to  
21 Monsanto as to we want you to produce this compound this way,  
22 there are lots of different PCB combinations and --

23 THE COURT: That's what I wanted to ask. My point on  
24 helium is there's only one way to provide helium: You go find  
25 helium and put it in there. There's a million ways to make a

1 helicopter.

2 On that continuum, where is PCB?

3 MR. KETTERLING: On that continuum, PCB is --

4 THE COURT: There's a lot of ways to make it?

5 MR. KETTERLING: There's a lot of ways to make it and  
6 the government is not calling for a specific -- the government  
7 is simply asking for an off-the-shelf product to be contained  
8 in the product that it's ordering. It's not directing  
9 Monsanto, we want PCBs and we want you to make them this way or  
10 we need it done this way.

11 THE COURT: All right. So that's your argument, and  
12 then you have two other arguments. One is that in some of the  
13 instances we'll discuss, the requirement to put in PCB isn't  
14 even made to Monsanto, it's made to somebody else who then asks  
15 Monsanto to help them out. That's your argument, right?

16 MR. KETTERLING: That's one of the arguments, yes.

17 THE COURT: And another argument is that sometimes  
18 the government doesn't even say "must." It just says, "Well,  
19 maybe we'd kind of like it, but you can do something else if  
20 you would like."

21 MR. KETTERLING: Yes.

22 THE COURT: All right. Let's go with the chart I  
23 gave you and walk through it one by one.

24 As to the *Watson* three-part test, what's your  
25 argument on necessity certificates? Does that show enough

1 control?

2 MR. KETTERLING: Your Honor, I don't think that shows  
3 any control. I think that shows a tax credit. It doesn't show  
4 the government telling Monsanto what to do, how to manufacture  
5 PCBs in any sense. It shows a touch, a connection to the  
6 federal government in the manner of tax credits it gets. It's  
7 not the government saying, "We want you to build this factory  
8 to build PCBs like this."

9 So I think the necessity certificates aren't even  
10 close to being government control of Monsanto.

11 THE COURT: It encourages PCB production, right?

12 MR. KETTERLING: Encourages anything else Monsanto  
13 wants to make as well with the tax credits. It's not --

14 THE COURT: Maybe as well, but not to the elimination  
15 of PCB, right? It does, in fact, encourage PCB production,  
16 right? That's not a hard question, Counsel.

17 Let me state it instead of make it a question.

18 It does encourage PCB production. Your argument is  
19 the government encourages a lot of things. That's not *Watson's*  
20 control, though.

21 MR. KETTERLING: It may encourage it through tax  
22 credits that this company can make PCBs, yes.

23 THE COURT: All right. So as to the necessity  
24 certificates, you don't think the control under *Watson* is  
25 there.



1           What about the nexus, the expanded facilities -- the  
2   PCBs, rather, produced at these expanded facilities, expanded  
3   from encouragement of a necessity certificate went to Oregon,  
4   made it to Oregon. Is that known? Unknown? Didn't happen?  
5   What's the deal?

6           MR. KETTERLING: There's no proof. It's not our  
7   burden on this. It's their burden to prove by preponderance of  
8   the evidence that there is that causal nexus and the --

9           THE COURT: Your contention is that right now it's  
10   simply not alleged, the nexus is not alleged?

11          MR. KETTERLING: Yes. There is no showing of any  
12   nexus between the federal government's direction of the  
13   necessity certificates and manufacturing of PCBs that were  
14   targeted to come to Oregon.

15          THE COURT: All right. And as to the -- this one  
16   would only involve, I think, the government contractor defense.  
17   We didn't talk about its subparts, but you've briefed them, the  
18   four subparts to the government contractor defense?

19          MR. KETTERLING: Yes.

20          THE COURT: Do you find that any or all of them fail  
21   here?

22          MR. KETTERLING: I think in the government contractor  
23   defense, I think first of all, in looking at a colorable  
24   federal defense, I think the standards are important, and I  
25   think the *Holdren* case talks about the plausibility of the

1 defense, not just saying there's a defense but the colorability  
2 relates to whether it's really plausible.

3 In this case there isn't any evidence that it applies  
4 or that Monsanto is a contractor who designed and manufactured  
5 military equipment for the government.

6 It also doesn't show that the U.S. -- and this is the  
7 language from *Boyle*, I believe. "U.S. approves reasonably  
8 precise specifications and contractor warns the U.S. about the  
9 dangers of the use of the equipment."

10 Now, that doesn't mean that they don't have the  
11 ability to raise a federal defense in state court, but I don't  
12 think they have brought it to a level in these pleadings where  
13 there's a colorable federal defense that they can assert under  
14 these grounds.

15 THE COURT: All right. Thank you.

16 I think what I'd like to do, rather than hear all of  
17 your arguments on all of this, is just go back and forth one at  
18 a time.

19 MR. KETTERLING: Sure.

20 THE COURT: Does that pose any problem for you?

21 MR. KETTERLING: No.

22 THE COURT: All right. So I'd like to go through the  
23 three-part matrix on the necessity certificates, first as to  
24 the degree of control involved under *Watson* by the issuance  
25 from the federal government of these necessity certificates.

1 MR. ZIMMER: Fair enough, Your Honor. I'm going to  
2 take the podium, if I may.

3 THE COURT: That's fine.

4 MR. ZIMMER: I also have -- I don't know if you want  
5 to get it now or later, but I have a slide deck as well. It's  
6 shorter than Mr. Howard's and I'm not going to put it up on the  
7 screen but I'll at least hand it out.

8 THE COURT: That's fine. Please do.

9 MR. ZIMMER: (Handing.)

10 All right. Thank you, Your Honor.

11 Let me start by saying something about the issue of  
12 the helicopter analogy which Your Honor raised. Helium is  
13 about as close to this as you can get. PCBs are a molecule,  
14 and if you change that, then they're no longer a PCB.

15 You saw in evidence that we've submitted that the  
16 government, for example, ordered Monsanto, directed them to  
17 supply Aroclor 1242 to Raytheon.

18 By the way, as a quick aside, there's no question but  
19 that we are a subcontractor in many of these situations. As  
20 our papers indicate, the cases don't distinguish between  
21 subcontractors and contractors. So I think everybody --

22 THE COURT: Well, they don't distinguish in the sense  
23 that the government can exercise sufficient *Watson*-level  
24 control over subcontractors as well as contractors. You still  
25 have to show that control by you as a subcontractor.

1 MR. ZIMMER: Correct. But in the analogy I'm giving  
2 you -- or the example I'm giving you, rather, that's borne out  
3 in our papers and the exhibits, when Raytheon needed missile  
4 potting material from Monsanto that included Aroclor 1242, that  
5 product is specified, and if that molecule were changed, if  
6 1242 was altered in some way, it wouldn't have satisfied that.  
7 And the evidence shows that the government declined to agree to  
8 any other material that would satisfy that purpose.

9 THE COURT: So it is your position, picking up the  
10 sort of semi-parade of horrors you just heard, that any time  
11 the government reaches out into the marketplace and says, well  
12 what we want to buy must have this component in it, and  
13 specifies the competent, that a dispute over that commercial  
14 transaction could end up in federal court?

15 MR. ZIMMER: Well, Your Honor, I think it depends on  
16 the type of product that it is and how long and specific, if  
17 you will, that process of compulsion goes on. Here you've seen  
18 it transcend several wars and conflicts and a good deal of  
19 years.

20 And, of course, what you heard from opposing counsel  
21 is that we somehow have to now within 30 days of being served  
22 with the complaint prove all these things that occurred  
23 somewhere between 40 and 89 --

24 THE COURT: Counsel is not making you do that. I  
25 mean, that's just what the law is. Right?

1 MR. ZIMMER: Right.

2 THE COURT: And that's everybody -- that's everybody  
3 who removes a case. If you remove a case, you'd better be  
4 ready to defend the removal pretty quickly. That's how civil  
5 procedure works.

6 MR. ZIMMER: Understood, Your Honor. And I think we  
7 have done that but I want to make one observation because it  
8 came up earlier as well in Your Honor's comments about facial  
9 versus factual attack. With all respect, I do think this is a  
10 little different from a pure factual one, for the primary  
11 reason that the *Leite* case talks about what was shown there,  
12 and the showing that they made as a factual challenge to what  
13 had been proffered when the removal was made was to introduce  
14 extensive evidence outside the pleadings. And that included  
15 military specs, technical manuals, warning label guides, and  
16 deposition excerpts. None of that has been done here. In  
17 fact, the only thing that's been done here is for counsel to  
18 make their own argument and interpretation. And I would simply  
19 submit that the argument of counsel is not enough to change  
20 that from a facial to a factual.

21 THE COURT: Thank you. Let's turn to the necessity  
22 certificates.

23 MR. ZIMMER: All right.

24 Now, you've seen in our papers, Your Honor, that the  
25 Anniston, Alabama plant was expanded dramatically, and indeed,

1 there's really no dispute that the number is somewhere between  
2 and 80 and 100 percent of its production was devoted to  
3 wartime. The papers I think from both sides came to agreement  
4 on that.

5 THE COURT: That doesn't help me with the question of  
6 control. That that fact happened is agnostic on the question  
7 of control.

8 MR. ZIMMER: Well, let me say, Your Honor, I think  
9 the exhibits we've submitted -- and you've got the numbers  
10 correct there, 11 through 16, there may be one or two more --  
11 describe that process as one that the government was insisting  
12 upon. They needed and, in fact, were paying, if you will,  
13 Monsanto for production of this essential wartime project.  
14 That's why that plant expanded.

15 THE COURT: Your client was encouraged to expand  
16 through a tax credit, right?

17 MR. ZIMMER: Yes, Your Honor. And, in fact --

18 THE COURT: And it did expand because it got a tax  
19 credit -- well, in part. Who knows why else. But in part  
20 because it got a tax credit to expand.

21 So the control is -- they could have not expanded,  
22 correct?

23 MR. ZIMMER: Well, I suppose that's possible, Your  
24 Honor, but given the way these exhibits read, it certainly  
25 looks as if the government is insisting that they need more and

1 more of this and that Monsanto is falling short of it, they  
2 need to expand.

3 THE COURT: You mention in your brief that this is a  
4 point -- I think this may be one of the points you're talking  
5 about, that Monsanto would have ignored the encouragement of  
6 the government to expand here at its peril. What does that  
7 mean?

8 MR. ZIMMER: Well, for example, Your Honor, there are  
9 orders that are made exhibits to our papers that show that the  
10 Defense Production Act was invoked. So it left us with no  
11 option.

12 And one very important detail that I don't think we  
13 made enough of in our papers, and I want to make sure I call to  
14 the Court's attention here, is that several of the orders that  
15 we marked as exhibits -- and I can give you examples in a  
16 moment, but several of them talk about orders that we were  
17 directed to fill after 1970 and '71. And in 1970 and '71,  
18 that's the time frame in which Monsanto stopped selling PCBs  
19 commercially for most uses. The only ones that continued were  
20 in very closed settings, such as capacitors and transformers.

21 THE COURT: All right. So on the necessity  
22 certificates, your argument is that it was a powerful push by  
23 the government that you would have only been able to ignore --  
24 that is, say no to -- at your peril, right? That's the control  
25 argument.

1 MR. ZIMMER: That is correct, Your Honor.

2 And I do want to make one brief point about the  
3 financial aspect of this. I am still a little surprised at  
4 whether there is a meaningful distinction between a tax credit  
5 and an actual check being written.

6 THE COURT: There is no financial distinction. I  
7 agree with that. No economist on Earth thinks there's a  
8 financial difference between a payment -- a financial payment  
9 by the government and a tax credit.

10 But it can be very different for control purposes.  
11 The government could give the states money under the Federal  
12 Highway Act and say, "You take this money, the speed limit has  
13 got to be 55." Or the government can give states money under a  
14 block grant and say, "Do whatever you want with it." They're  
15 both dollar-for-dollar transfers but they have a different  
16 flavor on the question of control. So to say that there's no  
17 economic difference between the two doesn't really advance your  
18 argument much. It's all about control.

19 Let's turn to nexus. What's the nexus between the  
20 necessity certificates and the problem here in Oregon?

21 MR. ZIMMER: Well, Your Honor, here I have to fall  
22 back again on what the Ninth Circuit cases say, *Leite* and  
23 others, that indicate that the defense theory of the case is  
24 the one that should apply.

25 THE COURT: Sure. So do you have allegations here



1 that show that the expanded facilities produced PCBs that ended  
2 up here in Oregon?

3 MR. ZIMMER: We do, Your Honor.

4 THE COURT: Where?

5 MR. ZIMMER: Well, we have been charged with, if you  
6 will, in plaintiff's complaint, responsibility for virtually  
7 every PCB molecule that ever existed.

8 THE COURT: Well, you just told me that's not the  
9 theory I should care about.

10 MR. ZIMMER: I'm sorry, Your Honor?

11 THE COURT: You just told me plaintiff's theory is  
12 not the one I should care about. So I'm looking for you to  
13 show me where you pled or alleged that the expanded facilities  
14 expanded under the necessity certificates produced PCBs that  
15 ended up here in Oregon. Did you do that?

16 MR. ZIMMER: I can do that, Your Honor, by indicating  
17 that all of those PCBs were made for the wartime effort -- this  
18 is in World War II when that expansion occurred -- and thus  
19 wound up in Navy and other ships, which then, of course, have  
20 traversed the whole country, and many of them wound up here in  
21 shipyards, where they were repaired, sometimes actually  
22 manufactured.

23 THE COURT: It's not absolutely necessary, but  
24 probably at least at some point the answer to my question  
25 requires a citation to where you said that in any pleading.

1 Did you say anything like that or are you just saying that here  
2 in oral argument? Did you say the expanded facilities ended up  
3 in ships and some of those ships came into the Portland Harbor?

4 MR. ZIMMER: I can't point you to a specific place in  
5 our papers where we did that, Your Honor, but I'm certainly  
6 asserting it today, and I don't think that it's in dispute,  
7 because the --

8 THE COURT: Well, it is in dispute. It's very much  
9 in dispute. That's exactly the dispute. And the point is --  
10 and this is where we get back to factual versus facial. The  
11 point is they say you have to show a nexus and you haven't  
12 alleged a nexus.

13 So I'm just asking have you met your burden of  
14 alleging a nexus?

15 MR. ZIMMER: Let me back up a step, then, and  
16 indicate perhaps I haven't explained what I think our nexus  
17 theory of the case is adequately.

18 What I'm suggesting is if they are tarring us with  
19 responsibility for every molecule, then our theory of their  
20 case is anywhere it's found, we're going to be responsible for  
21 it, so that means every molecule counts, and we don't need to  
22 go further than that to say that any expansion --

23 THE COURT: In fact, then, you don't have to show any  
24 particular nexus. You're just saying if it's a PCB molecule  
25 and they say it's ours, then somehow -- I think the argument

1 they posed to you in contrast, at least in the pleadings, is  
2 they believe the nexus argument requires that the activity --  
3 the asserted basis for jurisdiction that you're asserting has  
4 to have resulted in the harm that they claim.

5 So you're saying just anything we did at any time  
6 might conceivably have resulted in a Navy warship coming  
7 through Portland, and that would be part of the contamination.

8 MR. ZIMMER: Well, I'm saying a little bit more than  
9 that, Your Honor, but I agree with your summary of it.

10 The point is that we know and it really can't be  
11 reasonably disputed that several shipyard building operations,  
12 repair facilities, and decommissioning operations occurred in  
13 the Portland Harbor. There's a whole host of things that took  
14 place there.

15 In fact, I brought with me something that we found  
16 after the briefs were filed that I would like to submit and  
17 offer to plaintiff's counsel as well, which is from their own  
18 website, the State's website. And it acknowledges that  
19 shipyards are, in their view, a suspected source of PCB  
20 contamination. That's not a topic, I don't think, Your Honor,  
21 that really can be subject to dispute.

22 Let me, if you don't mind my stepping away --

23 THE COURT: I don't think you need to add that to the  
24 record. That's not the most shocking thing I've heard today.

25 MR. ZIMMER: Fair enough.

1 I'm happy to respond to other questions about that  
2 point if you would like me to.

3 THE COURT: No, I understand your nexus argument.  
4 It's a broad nexus argument, but I think I understand it.

5 MR. ZIMMER: And I do think it's supported by the  
6 case law, because once again the cases uniformly say in the  
7 Ninth Circuit that it's the defense theory of the case that is  
8 to apply. I think that's reflective, Your Honor, of the stage  
9 where we are. And, you know, I practiced for 35 years --

10 THE COURT: I don't know that saying that the defense  
11 theory of the case means that I simply have to accept the  
12 defense theory of nexus. Just because you've stated a theory  
13 of nexus doesn't mean it's satisfactory. I don't know one way  
14 or the other if it is or isn't yet. You seem to suggest that  
15 the Ninth Circuit is telling me that if you have a theory of  
16 nexus, that's the one I should apply.

17 MR. ZIMMER: Well, that's my read of the cases. They  
18 actually single out that stage of the test that you're  
19 describing, the causal nexus, and they say the defense theory  
20 of the case is the one that applies to that.

21 THE COURT: Are you asserting then a government  
22 contractor defense as the defense that you'd have to be able to  
23 show under *Watson*?

24 MR. ZIMMER: Your Honor, we're asserting --

25 THE COURT: As to the necessity certificate?

1 MR. ZIMMER: Correct. Not only that, but also -- and  
2 Your Honor already mentioned this, that we have three colorable  
3 defenses we're asserting: a government contractor defense;  
4 along with the Defense Production Act that I referenced  
5 earlier; and then the topic that I still assume you don't want  
6 to hear more about, which would be express and implied  
7 preemption under CERCLA.

8 THE COURT: So how do the necessity certificates  
9 satisfy the elements of the government contractor defense?

10 MR. ZIMMER: Well, I've already acknowledged, Your  
11 Honor, that in most of the settings we're talking about here we  
12 were acting as a subcontractor to other companies, either  
13 Raytheon, GE, Westinghouse -- you saw the names of several  
14 others -- when we were supplying these materials to them. That  
15 became an important component part of what they were producing  
16 for the military. But, again, it was one that the military has  
17 shown was essential in the communications that are reflected in  
18 our exhibits.

19 THE COURT: One element is that the supplier --  
20 that's you -- warned the U.S. about dangers. Is that --

21 MR. ZIMMER: I'm sorry, Your Honor?

22 THE COURT: One element is that the supplier --  
23 that's you -- warned the U.S. about dangers. Is that in the  
24 record here?

25 MR. ZIMMER: That is in the record, Your Honor. And

1 indeed, going back to the 1972, '73, and '74 exhibits that we  
2 were speaking about a moment ago, Monsanto amply did that,  
3 informing the government that it no longer was selling these.  
4 In fact, there are exhibits that we've submitted that said it  
5 didn't want to, and yet it was still compelled to.

6 THE COURT: All right. Thank you.

7 MR. ZIMMER: Thank you, Your Honor. I have other  
8 comments if you'd like to hear them, but they're on slightly  
9 different topics.

10 THE COURT: Let's stick to these in a row. I'm not  
11 going to cut you off. I'll hear from you later.

12 MR. ZIMMER: Understood. Thank you.

13 THE COURT: On the list I've given you -- Let me make  
14 sure I have the right list in here front of me. The second  
15 would be the DPA orders as a group.

16 For the State?

17 MR. KETTERLING: Your Honor, respectfully, I don't  
18 see how the DPA orders add anything to this case. They -- I  
19 think there are two at the most, and they simply tell Monsanto  
20 to prioritize these orders that have already been placed by  
21 other purchasers. I don't see how that --

22 THE COURT: There's two things going on here.  
23 There's what the statute says and what the orders say. And the  
24 order reads as though the government is actively directing  
25 Monsanto to produce PCBs for Raytheon; that they must do it.

1           Let's assume just for a moment that that's the case,  
2           that the government tells Monsanto, you have to produce PCBs  
3           for Raytheon even if Monsanto doesn't want to. Now, that's not  
4           a lot of specifications, that's not a lot of, you know,  
5           requirements and, you know, things about how it has to be  
6           produced or when or under what circumstances or in what kind of  
7           factory, but it is a fairly high level of control for the  
8           government to tell a manufacturer, you must make this for  
9           someone and send it to them.

10           Is that bare fact alone, if it's true -- I'll allow  
11           you to disagree in a moment. But if that fact is true, is that  
12           bare fact alone, that the government says to Monsanto, you have  
13           to make this, enough to be control?

14           MR. KETTERLING: And I do contend that that fact is  
15           not true, but it is still not enough to be control. It is  
16           not -- it's not any precise specifications as required by  
17           *Watson* or the *Holdren* case or the *Boyle* case.

18           THE COURT: So if the government says, "We don't care  
19           how you make it, but what we also don't care about is you don't  
20           want to make it. You must make it, make it now, and send it to  
21           Raytheon," that's not enough control?

22           MR. KETTERLING: No. It's a product they already  
23           have. It's not we want you to start up this plant and make  
24           specifically this type of Aroclor. It is you have this product  
25           and we want you to sell it to Raytheon.

1 THE COURT: So if the government says to the steel  
2 industry, you must quit making cars, you must give us your  
3 steel for tanks and planes, that's not control?

4 MR. KETTERLING: I don't think that's control for  
5 federal officer jurisdiction.

6 THE COURT: All right. And then on nexus as to the  
7 DPA orders?

8 MR. KETTERLING: I don't think the DPA orders have  
9 anything to do with Oregon whatsoever, and I don't think  
10 there's any proof that the DPA orders, the ones that are in the  
11 record at least, simply say prioritize these shipments. It  
12 doesn't say we want this --

13 THE COURT: So for you nexus means that Monsanto  
14 delivered PCBs to Oregon in response to the DPA orders, right?

15 MR. KETTERLING: I think there has to be some type of  
16 nexus. That would be ideal, but they don't have any --

17 THE COURT: If the DPA orders say, make this -- make  
18 these PCBs and send them to Maryland, and then we don't know  
19 what happens after that, that's insufficient nexus in your  
20 view, right?

21 MR. KETTERLING: If they say make these PCBs and send  
22 them to Maryland?

23 THE COURT: Send them to Raytheon.

24 MR. KETTERLING: That's a nexus to Oregon.

25 THE COURT: And what do you make of the idea that we



1 just heard of a nexus theory that says, look, you say you --  
2 your client says that the PCBs that are here in Oregon were  
3 made by Monsanto, therefore that's nexus. You say they made  
4 them so there's your nexus.

5 What do you think of that nexus theory?

6 MR. KETTERLING: Well, you can't forget that the  
7 nexus has to be also because of the federally directed  
8 activity. The fact that Monsanto made some PCBs for the  
9 government or end up in government hands, and many PCBs for  
10 other industries doesn't mean that there's a nexus just because  
11 we're suing on PCBs here.

12 THE COURT: So you're not asserting -- you say I  
13 shouldn't look at a nexus to Monsanto but rather a nexus to the  
14 federally controlled activity by Monsanto?

15 MR. KETTERLING: As I read the case law, that's  
16 what's required is the nexus has to be because of the federally  
17 directed activity.

18 THE COURT: And what about the idea that -- Let's say  
19 I find control on, say, the DPA orders or something else. No  
20 direct nexus at that moment to Oregon, but the theory is that,  
21 you know, warships floated through the harbor and dropped PCBs  
22 while they were here.

23 MR. KETTERLING: I don't think there's any proof of  
24 that nexus at all, and we talk about the factual versus facial.  
25 We're not required to disprove a negative. It's their

1 responsibility to provide factual evidence that proves their  
2 removal basis of federal officer direction and a causal nexus  
3 to Oregon, to the claims we bring here.

4 THE COURT: All right. Thank you.

5 And as to the last prong, the colorable defense  
6 prong, your argument?

7 MR. KETTERLING: I don't see that there's any  
8 evidence in the record that again reasonably precise  
9 specifications done for military purposes, contractor warns the  
10 U.S. specifically about the dangers of the product.

11 THE COURT: Do you agree there was a warning on the  
12 record here in this case?

13 MR. KETTERLING: I don't think there was a warning.  
14 I think years after -- I mean, near the end, Monsanto got what  
15 could best be classified as a get-out-of-jail-free card or  
16 attempt, but not even from the government. And it wasn't that  
17 we don't think these should be produced. I don't think that's  
18 in the record.

19 THE COURT: All right. Thank you.

20 On the DPA orders?

21 MR. ZIMMER: Thank you, Your Honor.

22 And I think I am going to go ahead and submit, if you  
23 don't mind, as a supplemental exhibit this State of Oregon  
24 website --

25 THE COURT: That's fine.

1 MR. ZIMMER: -- that we obtained. (Handing.)

2 THE COURT: I think I understand your control  
3 argument here already. I believe I've heard your nexus  
4 argument. The same nexus argument you made earlier would apply  
5 here, right?

6 MR. ZIMMER: It would, Your Honor, but with one  
7 additional wrinkle. Let me indicate this is dated -- it's  
8 called a PCP "Fact Sheet: Sources of Polychlorinated  
9 Biphenyls." It's from oregon.gov's website, and it's dated  
10 8-6-03.

11 And I want to point out here that they acknowledge in  
12 a section right on the first page entitled "background" that  
13 "Because of health concerns, in 1971 Monsanto voluntarily  
14 restricted manufacturing of PCBs to use only in closed  
15 systems."

16 And because we were speaking about the dates of when  
17 we were compelled to make additional sales to the government,  
18 sometimes postdating that 1971 date, I wanted to make sure you  
19 knew that that was in here.

20 THE COURT: Thank you.

21 MR. ZIMMER: In addition, on the last -- or sorry,  
22 third-to-last page of this exhibit, there is a section in  
23 Attachment 2 entitled "Fate and Transport of PCBs."

24 Forgive me, Your Honor, I should be standing.

25 THE COURT: That's fine. You can remain seated.

1 MR. ZIMMER: All right. Thank you.

2 On this page in the second paragraph, right  
3 underneath the PCB molecular structure diagram which is called  
4 Figure 1, it says this. They talk about PCB manufacturing  
5 having been banned in the U.S. and then the estimated number of  
6 tons of PCBs that were released, et cetera. And it says,  
7 "60,000 tons to fresh and coastal waters," and go on below to  
8 say, "Once reemitted, PCBs can be transported long distances in  
9 air."

10 Again, these are allegations that the State is making  
11 not Monsanto. I don't know that we even agree with them  
12 wholeheartedly. But the point is, they -- both in their  
13 complaint and in things that they have announced to the  
14 public -- view the presence of PCBs as ubiquitous, and are  
15 attempting to place the blame for them solely on Monsanto.

16 THE COURT: Right. I mean, the two of you now are  
17 talking past each other, however. You're saying that they want  
18 to blame you for all the PCBs on Earth, certainly all of them  
19 in Oregon. And that's fine, that may well be a colloquial  
20 description of what they're saying in their originally  
21 state-filed complaint.

22 That's not my question. My question is you wanted to  
23 bring this to federal court, so now you have to show federal  
24 actor jurisdiction. And that means you have to show, in my  
25 view, that the actions you took under the control of the

1 federal government resulted in the harms that are at the core  
2 of this case.

3 MR. ZIMMER: I understand.

4 THE COURT: So if all you've got is that other  
5 actions you took resulted in the harms at the core of this  
6 case, then we're back in state court. It doesn't mean that  
7 you're wrong in alleging that they're saying you're responsible  
8 for all the PCBs or that PCBs float all over the world. That  
9 just means that doesn't help me answer the jurisdictional  
10 question. I've got to find that the federal government made  
11 you do certain things that resulted in the harms here. And in  
12 my view, that means that you've got to show as your nexus that  
13 the federal government made you do things that resulted in PCBs  
14 being here in Oregon, not just that you in other ways may be  
15 responsible for them.

16 MR. ZIMMER: I understand, Your Honor, and I think,  
17 as I indicated earlier, it's not much of a leap to make the  
18 legitimate inference that because PCB production demanded by  
19 the military was so widespread, particularly in war years, that  
20 that consistently happened everywhere that Navy ships were  
21 constructed, repaired, decommissioned, et cetera, and that  
22 included substantial operations here in Oregon, which would  
23 then have resulted in PCBs getting into the water and hence --

24 THE COURT: Right. And that's where we really come  
25 to a burden of proof issue, because, I mean, you could have

1 said exactly that. You could have said that, among other  
2 things, Navy ships with PCBs were constructed, cleaned, docked,  
3 retrofitted, and otherwise worked on here for a long period of  
4 time in these waters.

5 But the question for today's purposes is did you say  
6 that. I think the answer to that question, as best I can tell,  
7 is no.

8 MR. ZIMMER: Well, I believe we at least inferred it,  
9 Your Honor, and if we didn't say it -- you have my sincere  
10 apologies -- it's without dispute, however, that that occurred,  
11 and that's again what we're being blamed for.

12 THE COURT: Thank you. That's all I really need to  
13 hear on DPA orders.

14 I'll turn again to the State on the indemnity  
15 agreement with the Atomic Energy Commission. Again, just point  
16 by point on the three elements of *Watson*.

17 MR. KETTERLING: Yes, Your Honor.

18 There are no specifications in here at all.  
19 Exhibit 23 actually says: Nothing herein shall create or imply  
20 any duty or obligation of Monsanto to sell or deliver any  
21 Therminol or other PCB products. So I don't think there's any  
22 government control whatsoever in connection with that.

23 Secondly, there is again absolutely no nexus to  
24 any -- I don't think it's federally directed actions. Even if  
25 it was federally directed, there's no nexus to Oregon in any

1 sense in that exhibit, and --

2 THE COURT: I've asked counsel, your opponent, a  
3 couple times about allegations, and understandably what I've  
4 heard so far is that he's not aware or perhaps not sure whether  
5 allegations making this nexus, alleging, for example, that  
6 items shipped elsewhere would have circumnavigated and made  
7 their way to these waters is something that is alleged or not.

8 Do you know for a fact whether that is or is not the  
9 case? Are you asserting that it's not being alleged here, the  
10 kind of nexus that we're talking about?

11 MR. KETTERLING: I don't believe it's been alleged,  
12 and certainly hasn't been shown by preponderance of the  
13 evidence before the Court.

14 THE COURT: All right. Thank you.

15 Anything you wish to add on the indemnity agreement?

16 MR. ZIMMER: Your Honor, only a brief response that  
17 addresses the indemnity agreement in the same fashion that I  
18 have with the other documents, and that is I think at that  
19 stage our view of what *Leite* and the other Ninth Circuit  
20 decisions hold is that we only have to allege facts that we  
21 believe sufficient to get us across this threshold.

22 THE COURT: Because you view it as a facial  
23 challenge?

24 MR. ZIMMER: Well, Your Honor, we do. I've  
25 acknowledged that we do. And I think, again, absent anything

1 beyond just counsel saying it doesn't say that, I don't know  
2 how else --

3 THE COURT: If it is in fact, as I've intimated, a  
4 factual challenge, do you agree you've only alleged it and  
5 not proven it?

6 MR. ZIMMER: Well, I think we have proven, Your  
7 Honor, under either of those standards quite a bit of  
8 direction, subjection, guidance or control.

9 By the way, I think that word has been left out of  
10 our discussions.

11 THE COURT: We talked about control, but I'm asking  
12 whether you think you've met a burden of proof under a factual  
13 dispute on nexus.

14 MR. ZIMMER: I do, Your Honor. I think we've met it  
15 under either standard, but of course we would read it much more  
16 readily were it only a facial.

17 I also want to indicate that, again, the leading case  
18 analogized, if you will, or invoked 12(b)(1) and 12(b)(6)  
19 standards. I started to mention earlier that I've been  
20 practicing for 35 years, and I've, of course, brought many a  
21 summary judgment motion. And many a time I've heard from the  
22 bench, "Mr. Zimmer, I appreciate your arguments and they're  
23 well taken and I'm quite certain that you'll win your case, but  
24 it's probably going to be at trial rather than here today."

25 Well, my view of this -- this probably won't surprise



1 you -- is that the shoe should now be on the other foot because  
2 I think we've done plenty, particularly given the passage of  
3 time here, to show you how these sales orders were received and  
4 fulfilled, and in particular if we now concentrated on --

5 THE COURT: Well, I want to make sure I get your  
6 argument. So if the shoe were on the other foot, you'd be  
7 saying that in the past you've wanted to show facts that would  
8 help you win, and the Court reminded you that at summary  
9 judgment, it's in the light most favorable to the nonmoving  
10 party. Even at the motion to dismiss stage, it's even more  
11 true.

12 MR. ZIMMER: Precisely.

13 THE COURT: Here if the shoe were on the other foot,  
14 you'd be saying you should just be able to allege certain  
15 things, and if you allege them in a plausible -- with the  
16 plausible sort of Rule 11 foundation and a colorable basis for  
17 doing so, that should be the end of the analysis, right?

18 MR. ZIMMER: That is exactly what the case law says.

19 THE COURT: That's true only if it's a facial  
20 challenge. You agree that that's not true; that's not the  
21 methodology I'm told I must employ if it's a factual challenge,  
22 right?

23 MR. ZIMMER: That is true.

24 THE COURT: All right. So let me make this simpler  
25 going forward. I hold that it is a factual challenge. I've

1 looked at the case, I believe it's a factual challenge, and you  
2 have a burden of proof, and it's not, in my view, a sort of  
3 unfair switching of the foot on one shoe versus the other, it's  
4 just what the case law and the rules require in the removal  
5 context.

6 It is unusual, it is odd, I agree with you, for me to  
7 be looking at factual disputes and seeing if someone met a  
8 burden of proof here, but that's the nature of remand and  
9 removal. I'm not given a choice in it. I'm under the control  
10 and command of the Ninth Circuit on this one.

11 MR. ZIMMER: I take your point, Your Honor, and  
12 accept it.

13 THE COURT: So let's go forward with the assumption  
14 that what you've got is a burden of proof to meet a factual  
15 dispute on nexus, for example.

16 MR. ZIMMER: Fair enough.

17 And I think we have, again, given my theory of nexus  
18 that I've already expressed to you, I do think it is incumbent  
19 upon the Court to also weigh each of these issues separately  
20 and determine whether or not it is sufficient for simply  
21 counsel to say, well, no, we read this differently, it looks  
22 like it's merely prioritizing a shipment, when the words "you  
23 are directed to" are in that exhibit.

24 THE COURT: All right. I agree they must be analyzed  
25 separately. Thank you.

1 MR. ZIMMER: Thank you, Your Honor.

2 THE COURT: Let's turn to the State for the  
3 specifications on heat-resistant aluminum paint. And again I  
4 don't need you to repeat articles that are identical across  
5 multiple categories, but if you have something new to add on  
6 the three matrixes, let me know.

7 MR. KETTERLING: Okay. On this, I won't get into the  
8 fact that there are no specifications, but what I do want to  
9 point out to the Court, however, is that it specifically says  
10 in Exhibit 4, "Sample composition. The following is an example  
11 of a formulation contemplated by the specification but in no  
12 way is a supplier restricted to this formulation."

13 So there is no reasonably specific specification to  
14 Monsanto on how to make PCBs. They're not even called for  
15 here. They're simply used as an example. And I would stick  
16 with my nexus arguments. I still see no evidence of any causal  
17 nexus to Oregon by federally directed action. And Monsanto  
18 says they've submitted all this proof, but over a course of 40  
19 years, it seems to me if there is a causal nexus to Oregon,  
20 there should be a lot more proof that they're able to come up  
21 with.

22 THE COURT: Thank you.

23 Again, I don't need you to repeat, for example, your  
24 nexus argument unless there's a variation on it here that you  
25 want to alter.

1 MR. ZIMMER: No, Your Honor. I'll keep this one  
2 short. The only thing I would put out here is this is one of  
3 the exhibits that we've proffered that shows that Aroclor 1254  
4 is indeed specified. And I take counsel's point that there is  
5 language in it that says it's an example of a formulation. The  
6 dilemma we're presented with, though, is it's the only one that  
7 would have fulfilled this. And we know that but don't have a  
8 specific exhibit we can submit to you to that effect. And I  
9 would ask the Court's indulgence to understand the position  
10 that we're in with the passage-of-time comments I've already  
11 made. Many of these events occurred as long as 89 years ago.  
12 The idea that this heat-resistant paint federal  
13 specification that was -- I'm looking for the year here --  
14 1959 -- and not surrounded by a lot of other paper that the  
15 company has retained is a function of the passage of time.

16 THE COURT: I appreciate that problem, although it  
17 seems to me that what that means is that in defending this  
18 case, you should have a court's indulgence in having the time  
19 you need to do the research you need, and even to take into  
20 account the possibility that some of what you need to know  
21 won't be available anymore. But that's the defense of the  
22 case.

23 You're not here today trying to defend the case,  
24 you're here today trying to remove it, and that means that you  
25 took the step of taking it out of state court and bringing it

1 here, and the burden is on you to justify the removal.

2 Now, it may mean that it's really difficult to do,  
3 but that's a part of the calculus you had to think about -- I'm  
4 sure you did -- before you removed it. And removal is a fast  
5 timetable. I understand that.

6 MR. ZIMMER: That's correct, Your Honor, and again  
7 I'm not apologizing or looking for extra time, if you will,  
8 other than that I think it is worth suggesting to the Court  
9 that we have not been able to avail ourselves of any  
10 third-party discovery yet, either to branches of the military  
11 or to other contractors to whom we supply. We don't know  
12 precisely whether they'd be able to fill in blanks of what some  
13 of these documents show, but we again believe that the showing  
14 we've made still adequately supports our removal.

15 And the State is trying to impose, with all respect,  
16 Your Honor, what we think is an impossible burden, given the  
17 passage of time. They want us to submit proof of precisely  
18 where, you know, a bulk-supplied product wound up in each and  
19 every instance, and insist again, as we've been describing,  
20 that it be without exception that the government either sat  
21 right behind us while we made it or designed it for us when,  
22 once again, there's no other design that could occur for a PCB  
23 molecule. We've already addressed that topic.

24 THE COURT: Thank you.

25 The next one is a little more multi-variant, and

1 that's sales to the federal government of PCB-containing  
2 products, generally speaking. And those include some to buyers  
3 throughout the country, including Department of the Interior  
4 here in Oregon, per Exhibit 8 at least, some in Maine, some to  
5 Raytheon.

6 So, for the State, walk me through the three parts.

7 MR. KETTERLING: Okay. There's no proof in any of  
8 those exhibits of reasonable specific specifications or the  
9 government telling Monsanto what to do or how to do it.

10 THE COURT: So this is the setting that you talked  
11 about earlier where you talked about off-the-shelf sales,  
12 right?

13 MR. KETTERLING: They're just buying it like  
14 everybody else can buy it. And, in fact, if you look at  
15 Exhibit 8, the page we were given is page 502. So who knows  
16 how long this report was overall, and the -- getting to your  
17 third point, which is colorable federal defense, this isn't  
18 even a sale to the military. It's not a military contract  
19 sale. It's a sale to the U.S. Department of the Interior.

20 If you look at Exhibit 9, it's page 668 is what we've  
21 received. And in there they find one Oregon connection, I  
22 think, which is Zidell Machinery Company, which isn't the  
23 government at all.

24 So I don't think we've got any federal officer  
25 direction or specification shown in these exhibits, certainly

1 there's no nexus, and I don't even think you can raise a  
2 colorable federal defense on this basis.

3 THE COURT: Thank you.

4 Go ahead, sir.

5 MR. ZIMMER: Yes, Your Honor. Let's look at  
6 Exhibit 6, if we could, very briefly.

7 THE COURT: Go ahead.

8 MR. ZIMMER: The government has directed us to  
9 proceed to manufacture missiles but has refused to authorize  
10 Raytheon to qualify a new potting material which would avoid  
11 use of Aroclor 1242.

12 Another portion of that same exhibit reads that they  
13 are acknowledging the fact that Monsanto in all of our  
14 dealings -- this is Raytheon now -- expressed a strong  
15 preference not to sell this product to us, and is proceeding  
16 with the sale only at the direction of the government.

17 I don't know how that's not direction, subjection and  
18 control, Your Honor. And I want to point out one more time  
19 that at that point in time -- and we're looking now at April of  
20 1973 -- this is now two years after Monsanto voluntarily  
21 stopped selling PCBs for the very use that this is compelling  
22 them to do, in a plasticizer setting, because the potting  
23 material that was including Aroclor 1242 is such a product.

24 THE COURT: What is your colorable defense for the  
25 sales, let's say, to the most direct Oregon connection, the

1 ones to the Department of Interior here in Oregon? What  
2 colorable defense would you be asserting as to those sales?

3 MR. ZIMMER: Well, I suppose if it's not one that was  
4 ordered by the Defense Production Act, then it would have to be  
5 the government contractor defense, Your Honor, and the points  
6 we made earlier about CERCLA.

7 THE COURT: But even that requires some military  
8 connection, right?

9 MR. ZIMMER: True.

10 THE COURT: And that's missing at least as to those  
11 particular sales?

12 MR. ZIMMER: Well, to a couple of those exhibits that  
13 you called out, yes, Your Honor, but not all of them.

14 THE COURT: Do we know how many of these sales -- I  
15 guess you'd like me to assume that all the Raytheon sales are  
16 military connected, right?

17 MR. ZIMMER: Yes, I would, Your Honor. They were  
18 manufacturing missiles for the military.

19 THE COURT: And that's a fair inference, I think,  
20 from the exhibits you've cited.

21 MR. ZIMMER: I believe it is.

22 THE COURT: Do we know as to others, where we don't  
23 have some obvious military connection like Raytheon or Lockheed  
24 or something, do we know as to the others one way or the other  
25 whether the sales involved some sort of military connection or



1 military equipment?

2 MR. ZIMMER: Well, we know, Your Honor, as I  
3 mentioned previously, that the expansion of the Anniston,  
4 Alabama plant resulted in production nearly exclusively,  
5 between 80 and 100 percent, to the military during wartime.  
6 That meant that the military was widely using PCBs in many of  
7 its products that found their way on ships and, of course, as  
8 we've indicated before, I think it's a fair inference to say  
9 that they wound up here in Oregon, just as they would in many  
10 other states.

11 THE COURT: Thank you.

12 MR. ZIMMER: Thank you, Your Honor.

13 THE COURT: The last asserted basis for federal  
14 officer jurisdiction I've listed here is sales to government  
15 contractors by Monsanto to government contractors for use in  
16 certain products. The State's argument?

17 MR. KETTERLING: The State's argument is that there  
18 is no reasonably specific specification by the government.  
19 There's no government control. This is simply between Monsanto  
20 and someone who wants to buy Monsanto's PCBs. There's  
21 absolutely no nexus to Oregon, and I don't see how there's a  
22 federal defense contractor defense to this.

23 THE COURT: And if the contractor had to have PCBs to  
24 meet specifications, what does that mean for Monsanto's -- the  
25 degree of control over Monsanto, in your view?

1 MR. KETTERLING: If the contractor went to Monsanto  
2 and essentially controlled the process and said, "We need it  
3 exactly in this compound, and we want you to do it this way,"  
4 and directed Monsanto's actions, and did that as a government  
5 contractor, that might get them somewhere.

6 THE COURT: Well, that's back to your original  
7 argument about control.

8 But what if the federal government tells the  
9 contractor, "You must put PCBs in this product," and so then  
10 the contractor turn around and says to Monsanto, "We need this  
11 product to have PCBs in it, it must have PCBs in it, that's  
12 what the federal government is telling us, so that's what we're  
13 telling you."

14 Does that work?

15 MR. KETTERLING: To me that's the same as TSA says we  
16 need TV screens and we didn't have this kind of a transformer  
17 in them. But it doesn't mean that the company that makes the  
18 transformer, the same transformer you can buy anywhere else  
19 around the country, it doesn't make it a federally directed  
20 activity on the subcontractor.

21 THE COURT: Thank you.

22 Go ahead, sir.

23 MR. ZIMMER: Thank you, Your Honor.

24 Well, let's look at Exhibit 18, one of the ones you  
25 asked about. This doesn't actually deal with transformers but

1 it deals with wire and cable applications. And here's the line  
2 I'd like to read from that and discuss with the Court.

3 "Aroclor 1254 was used exclusively in cellulosic  
4 lacquer utilized to meet military specs for lacquer used in  
5 wire and cable applications."

6 Your Honor, I don't know how a fair reading of that  
7 would not indicate that Aroclor 1254 was required to meet  
8 military specs. That's our take on it. I think it's again a  
9 fair factual allegation that if there's a tie to be broken, it  
10 should be made in our favor.

11 THE COURT: So let's assume for the moment that if  
12 the government tells Monsanto, "We want to buy this product,"  
13 and the only control it puts on Monsanto is to say it must  
14 contain PCBs, let's assume I accept your argument that that's a  
15 lot like helium, and I call that control sufficient under  
16 *Watson*, is there an analytical difference between that scenario  
17 and the government telling Raytheon or telling Acme  
18 Corporation, "You want to sell us this product, it must contain  
19 PCBs," and then Acme turns around and says, "Monsanto, we want  
20 to buy PCBs from you because to meet the government  
21 specifications on us, it's got to have PCBs in it."

22 Is that the federal government controlling Monsanto  
23 or just Acme?

24 MR. ZIMMER: I think it's both, Your Honor.

25 THE COURT: How? Obviously I'm giving you Acme. So

1 how as to Monsanto?

2 MR. ZIMMER: Because once again if you combine all of  
3 these things together and look at them collectively, you see  
4 that there is a course and pattern of us hearing not just from  
5 the contractor who is dealing directly with the government but  
6 from the government themselves, when they write to us and say,  
7 "You are directed to supply this to Raytheon."

8 THE COURT: Well, that's a whole nother hypothetical,  
9 right? I didn't say the government tells Acme to put in PCBs,  
10 Acme turns to Monsanto and -- oh, then, by the way, the  
11 government tells Monsanto to put in PCBs, because then I  
12 wouldn't have needed the middleman to make my hypothetical.

13 So I'm just asking if the only thing you get on  
14 Monsanto's end is a contractor who is on the hook with the  
15 government must have PCBs says to you, "Please sell me PCBs so  
16 I can meet this contractual requirement of the government," how  
17 is that the government controlling Monsanto?

18 MR. ZIMMER: Well, I think in the scenario you  
19 describe, Your Honor, it's not as good as the one that I did,  
20 which is what actually happened, but it is further --

21 THE COURT: It happened once. It didn't happen with  
22 all of these.

23 MR. ZIMMER: No, certainly not all of them.

24 THE COURT: I'm asking you about the other ones. I'm  
25 not concerned -- I'll analyze the one where the government told

1 Monsanto to give a contractor -- that it must give the  
2 contractor PCBs. I'll analyze that the same way as I analyze  
3 the government telling Monsanto to sell the government PCBs.  
4 Those are the same, I give you that, but there are others where  
5 it's just one step removed from that, and I'm curious how you  
6 see the government controlling Monsanto in that commercial  
7 arrangement.

8 MR. ZIMMER: I see it as further evidence of the  
9 government's need for and insistence upon the product in a  
10 variety of military applications.

11 THE COURT: Fair enough. But how does it show the  
12 government controlling Monsanto? It's not telling Monsanto to  
13 do anything, right?

14 MR. ZIMMER: It's doing it through the contractor who  
15 then has to get that from Monsanto, because again, as the  
16 plaintiffs have alleged, we're the only place that someone can  
17 go and get PCBs.

18 THE COURT: All right. And that fact is one that you  
19 find critical in distinguishing this from other sort of  
20 off-the-shelf sales?

21 MR. ZIMMER: Indeed.

22 THE COURT: The TSA example, for example, is where  
23 the TSA could turn to a hundred people to get the screens it  
24 needs, and if you don't want to do it, they'll go somewhere  
25 else, right?

1 MR. ZIMMER: That's correct, Your Honor.

2 THE COURT: Those are the ones I listed. What other  
3 asserted bases for federal officer jurisdiction are you  
4 alleging -- or rather proving?

5 MR. ZIMMER: Yeah. I mentioned Exhibit 6, Your  
6 Honor, which we wound up talking about actually anyway.

7 THE COURT: Yes.

8 MR. ZIMMER: And 21, which I'm going to try to find  
9 here. And this is another example of what I characterized  
10 earlier as being an unwilling sale by Monsanto, once again in  
11 particular because of the date involved. Exhibit 21 is dated  
12 November 17, 1972, and it's a response to -- from Monsanto to  
13 someone in the Bureau of Domestic Commerce of the U.S.  
14 Department of Commerce. And it states very plainly that "As  
15 you are aware, because of the increasing environmental concerns  
16 expressed about products containing polychlorinated biphenyls,  
17 (PCBs), Monsanto Company no longer sells Aroclor 1242 for the  
18 uses which we understand Emerson & Cuming, Inc. intend for the  
19 Aroclor 1242 we have been directed to deliver."

20 So here we're telling the government, look, we think  
21 you should find an alternative product. In fact, further down  
22 the page they say, "We therefore respectfully question the  
23 wisdom of your directing us to sell this material when, as we  
24 understand it, alternative acceptable materials are available  
25 for the use to which our Aroclor 1242 is to be put."

1 Further evidence, Your Honor, of being directed to do  
2 something over our objection.

3 THE COURT: Thank you.

4 Remind me of that exhibit number again. That was 21?

5 MR. ZIMMER: 21, Your Honor.

6 THE COURT: Thank you.

7 MR. ZIMMER: And then 23 is another one. If you'd  
8 give me just a moment, if you would.

9 Your Honor, I apologize. We've already addressed 23.  
10 I had my numbers fouled up. I think 21 is illustrative of the  
11 point I wanted to make here.

12 THE COURT: Thank you.

13 MR. ZIMMER: Thank you, Your Honor.

14 MR. KETTERLING: Your Honor, if we're on Exhibit 21,  
15 could I make one further comment?

16 THE COURT: Yes.

17 MR. KETTERLING: And I think the language in  
18 Exhibit 21 is significant because it does say at the end of the  
19 first page, "alternative acceptable materials are available for  
20 the use to which Aroclor 1242 is to be put."

21 In other words, this is just one of the alternatives  
22 the government could have used or could have specified that  
23 they wanted Raytheon to use. They decided to use this. It  
24 doesn't mean that they directed how to produce it. In fact,  
25 there are alternate materials that Monsanto says could also be

1 used. I think that's significant. It's not that the  
2 government is giving them precise specifications. They're  
3 saying we want this product that you have, but there are other  
4 products out there.

5 THE COURT: They're not saying we want this product.  
6 They're saying you must give us this product.

7 MR. KETTERLING: Well, this letter says that. We  
8 haven't seen the letter that supposedly directs this action.  
9 All we've seen is this letter which --

10 THE COURT: The evidence I have says it. The  
11 evidence I haven't, I don't know what it says. I can only go  
12 by the evidence I have in front of me.

13 MR. KETTERLING: It's a very self-serving letter, and  
14 it's one piece of evidence for them, but does it get to a  
15 preponderance of the evidence?

16 THE COURT: I sincerely doubt this letter was written  
17 in order to defeat removal. So that's the only way it would be  
18 self-serving.

19 MR. KETTERLING: Causal nexus is also completely  
20 lacking in this case with Exhibit 21.

21 THE COURT: Thank you.

22 I'll take a brief recess.

23 THE CLERK: Court is in recess.

24 (A recess is then taken.)

25 THE COURT: All right. I'd like to establish perhaps



1 a couple of goalposts or parameters that help decide the case  
2 in between a couple of extremes.

3 So first of all, as a predicate to analyzing the  
4 case, I've already held and I reaffirm that it's my view this  
5 is a factual dispute, placing on Monsanto the burden of proof  
6 that comes with that.

7 I'm sympathetic to the argument that that's difficult  
8 in this case -- it's difficult in many removal cases -- to gin  
9 up the proof that quickly without the typical tools for ginning  
10 up evidence that come in litigation, but there's nothing in the  
11 rules or the case law that allows me to say this dispute spans  
12 decades, therefore I'm going to excuse the typical requirements  
13 under federal law for removal.

14 And so that's how I view this case, that it is a  
15 factual dispute requiring or at least placing the burden on  
16 Monsanto to meet a certain factual showing at least for the  
17 disputed pieces of evidence here or disputed contentions of  
18 fact.

19 Then I want to talk about control in the way that  
20 it's played out in this case at least. I started out by  
21 suggesting that there's a difference in how to think about  
22 control that can be grounded in the -- what you might think of  
23 as the complexity of the object.

24 So it's true, in my view, that in this case there are  
25 not the lengthy specifications for how to make PCBs that you

1 might find with other products. There are not pages and pages  
2 describing on and on what kind of PCB we want here, nor are  
3 there pages and pages describing even the manufacturing  
4 process. But in my view, that's not fatal to an attempt to  
5 show *Watson*-style control here. And I use "control" as an  
6 abbreviation for the longer formulation we've already discussed  
7 as the test in this case.

8           And that's because it's impossible to go on and on  
9 and describe how you want a molecule to look. So in my view,  
10 you can show control in this case by the federal government  
11 saying, in essence, to Monsanto, "We demand that the product  
12 we're buying from you contain PCBs," or even "We demand that  
13 you provide us PCBs." That's even simpler, so I'll stick with  
14 that to start at least. The government says, "We demand that  
15 you produce for us PCBs in order to meet the specifications of  
16 this contract." Then, in my view, that's enough to show  
17 control.

18           As I've said, because this case doesn't -- the harm  
19 is based on the existence of the molecule in the environment,  
20 it's not an artifact of how it was made, so the process doesn't  
21 really matter, it's just the molecule is here or not here. And  
22 it's very difficult to think of multiple ways to formulate this  
23 molecule. There's really just one. So you can get control  
24 that way.

25           I don't think you have control if it's more

1 attenuated than that. So I don't think that you have control  
2 if you say, "We'd like this product to contain PCBs." That's  
3 not control.

4 I don't think you have control, for example, if you  
5 say, "Here's an example of the product that we want, and it  
6 contains PCBs, but don't think by the example that we're  
7 requiring PCBs." That's not control.

8 Similarly, you don't have control over Monsanto if  
9 the federal government says to a contractor, "We want you to  
10 provide us this product and it must contain PCBs," and Monsanto  
11 is not on the scene in that relationship. It's just that the  
12 contractor then turns to Monsanto and says, "We need you to  
13 sell us PCBs in order to satisfy the government's  
14 requirements."

15 I appreciate that this has an unusual fact to it,  
16 which is that the contractor has to turn to Monsanto in  
17 practical terms to get the PCBs, but I'm not being asked about  
18 how difficult life is for that contractor. I'm being asked  
19 about government control over Monsanto, and that's not a  
20 showing of government control over Monsanto.

21 Of course, there is a variation on that, where the  
22 government says what I just described to the contractor, and  
23 then turns around and tells Monsanto, "You must give the  
24 contractor PCBs." And I've already said I treat that the same  
25 as my first hypothetical, that if you've just got a contractor

1 tell Monsanto, "We really need your PCBs because we have to  
2 have them to meet a government requirement," that's not  
3 control.

4 If you have the government saying to Monsanto, "We'd  
5 really, really like PCBs in this product," that's not control  
6 either. It's got to be a must; they've got to demand it.

7 In my view, it's also irrelevant whether the  
8 government is demanding that Monsanto give it PCBs in order to  
9 meet contractual requirements even though Monsanto is  
10 unwilling. That's a better case for Monsanto, but I'll give  
11 Monsanto the victory if it just is required to produce PCBs in  
12 order to meet the government's contractual demands. In my  
13 view, that's enough to show *Watson*-style control.

14 I'd like to turn to nexus. And here I reject  
15 Monsanto's arguments about what nexus means in this case. I  
16 understand why that would be an attractive argument here, and  
17 it's not a silly argument, because it is true that in some  
18 way -- in some ways plaintiffs here are saying to Monsanto in  
19 the state court filings, "You are responsible for all these  
20 PCBs. If we find a PCB here in Oregon, it's yours."

21 So Monsanto wants to say, well, there's your nexus.  
22 Plaintiff's own statements say if there's a PCB here, Monsanto  
23 is responsible for it.

24 But that conflates that question of responsibility,  
25 you know, via CERCLA or anything else, tort or whatever it

1 might be, for the PCBs with the very different question I'm  
2 being asked here, which is the federal officer basis for  
3 jurisdiction. And that means that Monsanto has to show not  
4 just that any of its PCBs through a wide variety of means,  
5 including just private sales, ended up in Oregon. It has to  
6 show that the PCBs it made as a federal actor have a nexus to  
7 Oregon.

8           So, in my view, it's not enough to just say, hey, we  
9 made a lot of PCBs, and the plaintiff says they're all ours and  
10 they float and they fly and they travel on ships and they got  
11 to Oregon. I think the obligation on Monsanto is to show that,  
12 as against a contested factual dispute, to show that the  
13 activities -- the subset of all of its activities that are the  
14 activities it engaged in under the control of the federal  
15 government produce PCBs that can be linked to Oregon, and it's  
16 not plaintiff's obligation to show the PCBs here in Oregon are  
17 not so linked. It's Monsanto's obligation to show that the  
18 PCBs here in Oregon are so linked and that they're not the  
19 result of any of the myriad non-controlled activities Monsanto  
20 also engaged in during the relevant time period.

21           I'll set to one side for a moment the colorable  
22 defense issue and just focus on these two prongs of *Watson*.  
23 What I've said about nexus means that there is, in fact, no  
24 nexus to Oregon for almost all of the asserted bases -- of the  
25 activities that amount to the asserted bases for federal

1 officer jurisdiction. There's no showing by Monsanto. There's  
2 often -- maybe always, except in one instance, not even an  
3 allegation, but there's certainly no factual showing sufficient  
4 to meet any burden of proof on the question, with the bare  
5 exception of what I'll call the sort of off-the-shelf sale to  
6 the Department of Interior here in Oregon. There's a nexus.  
7 The problem is, there's also no control there and no colorable  
8 defense. Therefore, I grant the motion to remand.

9 Thank you all. We'll be in recess.

10 MR. KETTERLING: Thank you, Your Honor.

11 THE CLERK: Court is in recess.

12 (Proceedings concluded at 4:54 p.m.)  
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

July 26, 2018

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

DATE

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